IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.201 OF 1989

1. Khandu alias Kanderao Ramchandra Gode, since deceased by his heirs and legalrepresentatives
1A. Anjanabai Khandu Gode
1B. Jagannath Khande Gode
both residing at and Post Shindwada, Taluka Dindori, District Nasik
1C. Sitabai Madhavrao Sonawane
residing at and post Kajisangvi Tal. Chandwad, Dist.Nasik
1D. Janakabai Madhavrao Atre
residing at and post Umbarkhed Taluka Niphad, Dist.Nasik
1E. Vithabai Kedu Kushar
residing at and post Nandur-Khurd Taluka Niphad, Dist. Nasik. ..Appellants

Versus

1. Chandrabhagabai Rajaram Gade
2. Chandrakant Rajaram Gade
3. Pushpa Rajaram Gade
4. Usha Rajaram Gade
5. Namdeo Vithal Bhalerao since deceased his legal representaives
5a. Shobha G.Patil
r/at at and post Jaulk Wani Tal. Dindori, Dist. Nasik
5b. Sou Sitabai Namdeo Bhalerao
r/at Tisgaon, Tal. Dindori, Dist. Nasik.
6. Rajaram Vithal Bhalerao
7. Vasant Rajaram Gade
both Agri. r/o Tisgaon, Tal. Dindori, Dist. Nasik. ..Respondents

Miss A.R.S.Baxi for appellants
Mr.Kishor Patil i/b Mr.P.N.Joshi for respondent nos.1 to 4
Ms Deepa Matondkar i/b Mr.J.N.Pawar for respndent no.5

CORAM : P.V.KAKADE, J.

DATE : 14th OCTOBER, 2005.

ORAL JUDGMENT :

1. The appellants have preferred this appeal against the judgment and order passed by 2nd Addl. District Judge,Nasik decreeing the plaintiffs' suit by order dated 25th October, 1985 for partition and separate possession of respective shares of the property by modifying the decree passed by the trial court dated 31st July 1981.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The Plaintiff No.1 Chandrabhagabai filed the suit for herself and for her minor children claiming she was married to Rajaram after the death of his first wife. This marriage had taken place about 15/20 years ago. The plaintiff did not give any particulars about the year or date of marriage. It was submitted that the marriage had taken place in presence and at the hands of

priest in a Gandharva Form. After the marriage she gave birth to Respondent nos.2 to 4 who were begotten from the said marriage. Rajaram was serving as a Police Constable, who died in April 1969. The defendant no.2 Vasant is the son of Rajaram begotten from his first wife. Defendant no.1 Khandu is the uncle of deceased Rajaram. Rajaram's father Trimbak died long back in the year 1927-28. However, left behind a widow Manjulabai i.e. mother of Rajaram. Manjulabai who was original defendant no.5 had died during the pendency of appeal and her legal representatives are, according to the plaintiffs, defendant no.2 and all the plaintiffs. According to the plaintiff, she married with Rajaram in a Gandharva form and family was joint family having agricultural land, houses etc. at village Sindwad in Taluka Dindori and also at Tasgaon in Tal. Dindori. Family also owned movables like agricultural implements, cattle, including bullocks etc. The property belonging to the joint family. After the death of Rajaram, the property was mutated jointly in the name of Defendant no.1 and plaintiff as well as defendant no.2. Thus the property continued to be jointly recorded. However, after the death of Rajaram, the defendant nos.1 and 2 started troubling the plaintiffs by some means or other

and did not allow them to reside at Sindwad. The income of the joint family property was also not allowed to be taken by the plaintiffs proportionately to their share. This resulted in plaintiffs not getting any income and therefore, the plaintiff no.1 took her children and shifted to her father's house at village Dindori in Tal. Niphad. It is also contended that mango trees and Babhul trees belonging to the joint family were sold to third party. When it was learnt that she came to the conclusion that it was against her interest and hence decided to file the suit. The plaintiff has claimed the declaration that the sale deed executed by defendants with regard to the properties in question were not binding on her as the plaintiff had never consented to the same. According to the plaintiffs, they had 4/5 share in the suit properties and therefore, they have filed the suit for partition and separate shares and possession thereof. The defendants contested the suit, inter alia, denying the plaintiffs' claim and submitted that the entire suit property had come to their share after partitions were effected. They also challenged the legal status of plaintiff no.1 as legally wedded wife of Rajaram and stated that she had no right, title and interest in the suit property. Defendant no.5 was

joined subsequently in the suit, who contended that Rajaram had first married with a women by name Chandrabhaga and said Chandrabhaga died soon after the marriage. Thereafter, Rajaram married another woman, who was named as Chandrabhaga after her marriage. Defendant no.2 was born to this Chandrabhaga. This Chandrabhaga died due to disease of T.B. Thereafter, deceased Rajaram never married with anybody and therefore, plaintiff no.1 claims that she was legally wedded wife of Rajaram was denied and as such suit was sought to be dismissed.

4. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs had proved that the plaintiff no.1 was legally wedded wife of Rajaram and Plaintiff Nos.2 to 4 are legitimate children of deceased Rajaram. It was further held that the defendants failed to prove that there was previous partition between the defendant no.1 and deceased Rajaram and as such it was held that the plaintiffs were entitled to get partition and separate possession of share in the suit property and suit came to be decreed with direction to pay mesne profits.

. The appeal was carried to the District Court, Nasik. The learned Addl. District Judge after hearing both the parties came to the conclusion that the plaintiff no.1 was legally wedded wife of Rajaram and Plaintiff nos.2 to 4 legitimate children of Rajaram. It was also held that defendants also failed to prove the previous partition between the defendant no.1 and deceased Rajaram and as such suit came to be decreed by confirming the judgment of the lower court. However, shares of the respective parties were modified as observed by the lower appellate court. Also amount of mesne profit was modified and it was directed that amount of Rs.4500/= be paid by the defendant nos.1 and 2 to the plaintiffs towards past mesne profits and share of fruits and movables. Hence the present appeal.

5. It may be noted that at the time of admission of the appeal this Court has formulated the substantial questions of law to the effect that whether the marriage of the plaintiff no.1 was valid in law when in fact it was seen that the first wife of Rajaram was alive at the time of the plaintiff’s marriage?

6. In this regard I must note here that the entire

evidence on record shows that the bone of contention is legitimacy of marriage between the plaintiff no.1 and deceased Rajaram and therefore, evidence in that respect would be sufficient to decide the fate of the appeal. In this regard P.W.1 Chandrabhagabai has stated in her evidence that she had married to Rajaram in Gandharv form. Though she is unable to give year or month of her marriage, she has stated that the marriage had taken place some time 20 or 25 years prior to her evidence. This part of her evidence was recorded in October, 1979, therefore, it is apparent that the marriage had taken place some time between 1954 to 1959. There does not appear to be any dispute that the previous wife of Rajaram was also named. Chandrabhagabai, who died in the month of June 1957. The extract of her death register is at Exh.111. It was produced by the defendants which shows the date of death as 7th June 1957. The question therefore is as to whether the plaintiff can prove that she had married to Rajaram after June 1957 and whether her first marriage was lawfully dissolved. In her evidence she has stated clearly that there was a divorce obtained by her from her first husband. She had also stated that the first wife of Rajaram was dead when Rajaram entered into

Gandharv marriage with her. The name of first husband of plaintiff no.1 is stated to be Bhairu Dhondiba. She has deposed that Bhairu did not like her because she was illiterate and had given divorce to her as a result of that. According to the plaintiff, there was writing about divorce and her father had kept this divorce deed. This divorce deed was shown to Rajaram at the time of Gandharva. This divorce deed has not been produced by her in the court. It was submitted on behalf of the appellants that non production of divorce deed should lead interference that there was no such divorce deed. However, it must be noted that the divorce deed is an old document. Also it is to be noted that the plaintiff No.1 has lived with Rajaram as his wife openly for a long time and it was hardly expected by her that the divorce deed would ever be required later on. Her version that the divorce deed was not traceable appears to be probable in view of the long cohabitation that has taken place between plaintiff no.1 and deceased Rajaram.

. She has also examined her brother P.W.2 Bhikaji. He was serving in Security Press and he has stated that the first marriage of plaintiff no.1 was dissolved because the first husband was a educated person while

plaintiff no.1 was not. He has also stated that a divorce deed was executed in the matter and it was with the parents. But the said deed was not traceable. Thus this witness also speaks of a divorce deed which was executed and his evidence appears to be a natural as he is a brother, who should be in the know of the facts involved relating to the family. Next witness examined on behalf of the plaintiff is P.W.- Mule who is Brahmin priest, who had performed Gandharv marriage of the plaintiff with Rajaram. This witness has stated that he performed the marriage and before performing such marriage Plaintiff No.1 was divorced from her former husband and at the time of Gandharva this witness had seen the deed of divorce to satisfy himself that no illegality was being committed. This witness is also disinterested witness and there is absolutely no reason why he should be disbelieved. In view of this position, the factum of Gandharva between Plaintiff no.1 and deceased Rajaram must be held to be proved, as concurrently recorded by both the courts below. If this fact is accepted, then the question of legal status of Plaintiff’s marriage established.

7. The second contention raised on behalf of the

appellants is regarding the allegation that first wife of Rajaram was alive when the alleged marriage of plaintiff no.1 took place. The reasoning adopted by the learned lower appellate court in this regard appears to be quite acceptable when it is concluded that in all probabilities that first wife of Rajaram was already dead when plaintiff no.1 was married to him. This conclusion is based on various pieces of documentary evidence. It is to be seen that first wife of Rajaram died on 7.6.1957, the birth extract of plaintiff no.3, one of the children of deceased Rajaram and plaintiff no.1, apparently shows that he was born on 17th August 1958, which leads to presumption that plaintiff no.1 was married soon after first wife of Rajaram died. At any rate, the concurrent findings recorded by both the courts below on the basis of facts involved and proved on record appear to be reasonable, and therefore, cannot be doubted even for a moment. Under these circumstances, I hold that the plaintiff no.1 was legally wedded wife of Rajaram and Plaintiff nos.2 to 4 are legitimate children begotten from their marriage. It is also apparent from the evidence that plaintiff no.1 was married to Rajaram after death of his first wife and therefore, there is no legal bar in respect of

their marriage by resorting to form of Gandharva Vivah.

8. Once we reach this position, the remaining factors are seen to be properly adjudicated by the lower appellate court in respect of determination of share of the parties especially when the defendants have failed to establish that there was previous partition between deceased Rajaram and defendant no.1 and as such suit property was joint family property.

9. For the reason recorded above, I hold that there is no merits in the appeal and therefore appeal stands dismissed. In view of the facts and circumstances, there shall be no order as to costs.